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DEPARTMENT OF TRANSPORTATION

[4910-22-P]

Federal Highway Administration

Buy America Waiver Notification

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice provides information regarding the FHWA's finding that a public interest Buy America waiver is appropriate for the use of American and Canadian steel and iron products in the construction of the New International Trade Crossing (NITC) project.

DATES: The effective date of the waiver is [insert date one day after publication in Federal Register].

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, (202) 366-1562, or via e-mail at gerald.yakowenko@dot.gov. For legal questions, please contact Mr. Michael Harkins, FHWA Office of the Chief Counsel, (202) 366-4928, or via e-mail at michael.harkins@dot.gov. Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the Federal Register's home page at: <http://www.archives.gov> and the Government Printing Office's database at: <http://www.access.gpo.gov/nara>.

Background

The NITC project is a new border crossing proposed by the State of Michigan and the Government of Canada over the Detroit River linking Detroit, Michigan, to Windsor, Ontario. The State of Michigan and Canada signed a Crossing Agreement on June 15, 2012, authorizing the construction of the NITC. This Crossing Agreement provides a framework for a Crossing Authority established by Canada to design, construct, finance, operate, and maintain a new International Crossing between Canada and Michigan, under the oversight of a jointly established International Authority, and through one or more Public-Private Agreements with one or more private sector Concessionaires.

The Michigan components of the project that are not funded by the private sector Concessionaire(s) or by the US Federal government will be financed entirely with funds advanced by Canada (the “Canadian Contributions”). These components include the interchange linking the bridge to I-75, the Michigan approach, and the Michigan plaza (collectively, the “Michigan Components”). A record of decision (ROD) was signed by the FHWA for the NITC project on January 14, 2009, pursuant to the National Environmental Policy Act (NEPA), after extensive consideration of various alternatives, including the no build alternative, that were identified in the draft environmental impact statement (DEIS).

The FHWA's Buy America policy in 23 CFR 635.410 requires a domestic manufacturing process for any steel or iron products (including protective coatings) that are permanently incorporated in a Federal-aid construction project. The regulation also provides for a waiver of the Buy America requirements when the application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron

products are not sufficiently available. Here, the Governor of Michigan requests a waiver from Buy America on the basis that a waiver for this project is in the public interest.

In determining whether a waiver is in the public interest. The FHWA's decision is based on weighing the various factors surrounding each such request for a Buy America waiver. The circumstances for this particular waiver request by Michigan reflect the unique financing structure under which the Canadian government will bear the majority of the financial risk for constructing the NITC and the potential for the project to produce substantial economic and transportation benefits. Accordingly, this notice announces that a partial Buy America waiver is in the public interest to use American and Canadian steel and iron products in the construction of the NITC Project, and describes the reasons weighing in favor of this decision.

Discussion of Comments

In accordance with Title I, Division C, section 122 of the "Consolidated and Further Continuing Appropriations Act, 2012" (Pub. L. 112-55), the FHWA posted a notice of, and requested comments on, a proposed public interest waiver on its Web site for use of American and Canadian steel and iron products in the construction of the NITC project (<http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=80>) on August 31, 2012. The FHWA received 122 comments in response to the publication. Of these comments, 91 supported the proposed waiver while 13 opposed it. Also, 3 commenters did not express either support or opposition for the proposed waiver or the project. An additional 15 commenters expressed opinions on the NITC project itself, with 8 commenters expressed support and 7 opposed.

Comments were mostly submitted by individuals. Comments were also received from five unions (United Steelworkers, Michigan AFL-CIO, Michigan Regional Council of Carpenters, Transportation Trades Department (TTD) of the AFL-CIO, and the United Auto Workers), each of whom expressed support for the proposed waiver. Additional comments were received from 13 associations, each of which also expressed support for the proposed waiver, including the American Iron and Steel Institute (AISI). Comments were also received from 11 businesses. Of them, five steel companies and Ford Motor Company expressed support for the proposed waiver. Only one of these 11 businesses, the Detroit International Bridge Company (DIBC), opposed the proposed waiver.

Generally, support expressed by the commenters for the proposed waiver highlighted the notion of fairness of allowing the use of Canadian and American steel given the unique financing arrangement of the project under which the Canadian government is bearing most of the project cost. For example, the AISI commented that it is a strong supporter of Buy America, but given the unique financing arrangement for the NITC project, AISI supports granting a public interest waiver to allow the use of Canadian and American Steel. The United Steelworkers commented that this proposed waiver is a “one-of-a-kind circumstance” involving a unique financing mechanism where Canada is advancing all the funds to build the bridge and assuming all of the financing risk. The Michigan AFL-CIO noted that the NITC is financed solely by Canada. The Michigan Regional Council of Carpenters commented that the “NITC project presents a unique situation” whereby Canada is fronting all of the construction costs so it is only appropriate that the project uses both American and Canadian steel. The TTD commented that “TTD has a clear record of urging full compliance with federal Buy

America laws. However, given the nature of this project, the shared investment by both the US and Canadian governments, and the uniquely integrated industries that span the US Canadian border, [TTD] feels that the waiver application is appropriate and beneficial in this specific instance.”

Other comments supported the waiver as necessary in order to facilitate the construction of a project that has the potential to produce substantial economic and transportation benefits. For example, Ford Motor Company cited to a study by the Center of Automotive Research outlining the significant economic benefits of the NITC, which include:

- Jobs from bridge construction: 6,000 in each of the first 2 years of construction and 5,100 jobs in the final 2 years;
- Jobs from Statewide construction projects resulting from the federal match: 6,600 jobs per year for 4 years;
- Jobs from bridge operations: 1,400 permanent jobs;
- Jobs from new private investment: 6,800 permanent jobs; and
- Overall economic growth: Michigan state domestic product increased by \$2.2 billion, personal income increased by \$4 billion, and State and local revenue increased by \$400 million.

Also, the United Steelworkers noted that this project will create good jobs, including demand for at least 10,000 direct jobs and thousands of indirect jobs. The United Steelworkers further noted that millions of jobs in both countries are dependent on trade between the US and Canada, and the NITC will help retain and create more trade between the two nations. The Michigan AFL-CIO commented that in 2011, the US and

Canada shared \$597 billion in trade. This trade relationship supports 11 million jobs, of which 8 million are in the US and 230,000 are in Michigan. When complete, the NITC will position Michigan to expand as a trade hub creating economic growth and additional jobs. GreenStone Farm Credit Services commented that for 35 States, Canada is their principal export market, and the new bridge will create the first freeway-to-freeway connection between Detroit and Windsor. Amway Corporation commented that the new crossing is critical because American trade with Canada increases annually with truck traffic predicted to triple in the next 30 years. The TTD commented that this project would help create thousands of good paying American jobs with 10,000 direct construction jobs and 25,000 indirect jobs. The United Auto Workers commented that this project will create many thousands of well-paying construction jobs and additional spin-off jobs. The United Auto Workers further noted that the auto industry depends on a quick and easy border crossing for components and completed vehicles, and the NITC will assure adequate border mobility for the auto industry for many decades into the future.

Substantive comments opposing the proposed waiver, including comments from the DIBC, generally made the point that a private company is prepared to build a second bridge using only American iron and steel. The merits and impacts of constructing the NITC were extensively studied, weighed, and analyzed in the January 14, 2009, ROD. The process leading to the ROD considered numerous alternatives, including the DIBC proposal to construct its own new bridge. After considering these alternatives, the FHWA selected the present project that is subject to the proposed waiver.

The DIBC also expressed other comments that were considered in the environmental process for the NITC project. These comments include statements that the NITC will destroy businesses and result in a net loss of jobs. For the reasons articulated in the ROD regarding the selection of the current project over other alternatives, including the alternative proposed by DIBC as well as the consideration of the impacts to businesses, the FHWA directs commenters' attention to the ROD and other supporting documents and analyses, including the November 21, 2008, final environmental impact statement (FEIS). Because these impacts have already been considered in the environmental process, the FHWA declines to conduct a redundant analysis to reevaluate the merits of other alternatives. As such, the FHWA does not deem these factors to be relevant to consideration of the appropriateness of a Buy America waiver.

DIBC comments that this waiver is not in the public interest because the construction of the NITC is not authorized under Michigan State law. However, the FHWA declines to take a position on the application of Michigan State law.

The DIBC also comments that the proposed waiver is not in the public interest for the reasons specified in the DIBC's comments to the Secretary of State regarding the Governor's application for a Presidential permit. These comments, while voluminous, do not directly address the FHWA's consideration of the proposed waiver.

Some commenters suggested that specific percentages be established regarding the ratios of Canadian and American steel and iron that will be used in the construction of the NITC. While the specification of such percentages may appear reasonable, the FHWA does not believe that the specification of such percentages in advance of a decision on the proposed waiver is in the public interest. It will be difficult to determine

exactly how such percentages would be established absent specific contractor bids or proposals from potential public private partnership entities.

Another comment asked that, in light of Michigan's plan to leverage the Canadian financial contribution to the NITC as the State's matching share for other Federal-aid highway projects, the FHWA should clarify whether the proposed waiver is specific to the NITC or whether it will apply more broadly to Michigan's highway program in general. In response to this concern, the FHWA clarifies that the waiver proposed here is specific only to the NITC and will not apply to any other Federal-aid highway projects.

After considering and weighing all of the comments that have been submitted in response to the proposed waiver, including those specifically mentioned and discussed above, it is the FHWA's decision that the Governor's request to partially waive the application of Buy America to the NITC project to allow the use of both American and Canadian steel and iron is granted. The proposed waiver here presents a unique circumstance, as mentioned by the commenters highlighted above, under which Canada is assuming all financial liability and risk for the construction of this project. In light of the Canadian financial contribution, the FHWA believes that the basic notion of fairness weighs in favor of allowing Canadian iron and steel to be used so long as American iron and steel is allowed to compete on an equal basis. Moreover, the Canadian financial contribution to the project will make possible the creation of thousands of direct and indirect construction jobs, as well as numerous other jobs in the American economy, as a result of increased trade and productivity between the US and Canada.

In accordance with the provisions of section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572), the FHWA is

providing this notice as its finding that a waiver of Buy America requirements for the NITC project is appropriate. The FHWA invites public comment on this finding for an additional 15 days following the effective date of the finding. Comments may be submitted to the FHWA's Web site via the link provided to NITC waiver page noted above.

(Authority: 23 U.S.C. 313; Pub. L. 110-161, 23 CFR 635.410)

Issued on: December 5, 2012.

Victor M. Mendez
Administrator

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